

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES JEREMY BRISCOE,)
Petitioner,) CASE NO. C09-1847-RSL-MAT
v.) (CR-07-218-RSL)
UNITED STATES OF AMERICA,) ORDER DIRECTING
Respondent.) SUPPLEMENTAL BRIEFING

13 Petitioner James Jeremy Briscoe, proceeding *pro se* and *in forma pauperis*, moves
14 pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. (Dkt. 1.) He also
15 moves to clarify an order by Chief Judge Robert S. Lasnik in the underlying criminal case
16 (Dkt. 7), and to file a late response to the United States' papers (Dkt. 13). The Court STRIKES
17 his motion to clarify (Dkt. 7) as mooted by this Order and GRANTS his motion to file a late
18 response (Dkt. 13). For the reasons set forth below, the Court directs the parties to file
19 supplemental briefing regarding petitioner's justification for equitable tolling. Petitioner's
20 brief is due on **Thursday, May 27, 2010**; respondent's responsive brief is due on **Monday,**
21 **June 14, 2010**; petitioner's optional reply brief is due on **Friday, June 25, 2010**. The Clerk is
22 directed to renote petitioner's § 2255 petition for consideration on **Friday, June 25, 2010**.

BACKGROUND

02 Petitioner pleaded guilty to conspiracy to distribute crack cocaine on September 13,
03 2007, and was sentenced to 144 months of incarceration on December 14, 2007, the same day
04 on which final judgment was entered. *See* Dkts. 60, 87, 88, *United States v. Briscoe*,
05 CR07-218-RSL (W.D. Wash., filed May 24, 2007) (hereinafter “CR Dkt.”). He waived his
06 right to appeal his sentence except for claims of ineffective assistance of counsel. CR Dkt. 62,
07 at 7. Two years later, on December 14, 2009, petitioner moved for an extension of time to
08 appeal his sentence and to clarify his sentence. On January 21, 2010, Chief Judge Robert S.
09 Lasnik denied petitioner’s motion for an extension of time to appeal and clarified the basis for
10 petitioner’s sentence. CR Dkt. 107. Judge Lasnik ruled as follows:

11 An ineffective assistance of counsel claim can be brought as a federal habeas
12 corpus claim through a 28 U.S.C. § 2255 motion to the district court where
13 judgment was entered, but generally only within one year of entry of final
14 judgment. *See* 28 U.S.C. § 2255(f)(1). . . . A federal criminal defendant has
15 ten days after “entry” of the judgment being appealed to file a notice of appeal.
16 Fed. R. App. P. 4(b). Defendant did not file a notice of appeal. He now moves
the Court for an extension nearly two years after final judgment was entered on
December 14, 2007. As such, defendant’s proposed motion is untimely. The
Court finds no extraordinary circumstances to justify equitably tolling § 2255’s
statute of limitations. Accordingly, defendant’s motion for an extension is
DENIED.

17 || CR Dkt. 107, at 2.

18 On December 28, 2009—while his motion for an extension of time to appeal was still
19 pending before Judge Lasnik—petitioner filed the present § 2255 motion. In addition to
20 raising several substantive issue, petitioner contends that his § 2255 motion is not barred by the
21 one-year statute of limitations because: (1) from April 10, 2008, when he was transferred to a
22 high-security institution, to May 1, 2008, he did not have his personal property and could not

01 access his legal file, (Dkt. 14, at 2–3); (2) from June 28, 2008 to November 14, 2008, a
02 lockdown of the prison facility impeded his access to legal materials (Dkt. 1, at 12; Dkt. 1-2, at
03 3, 4; Dkt. 14, at 7); (3) from November 14, 2008 to mid-January 2009, his access to legal
04 materials continued to be impeded due to an institutional step-down in security and split-yard
05 system, as well as the fact that he was enrolled in a drug-treatment program such that he was
06 “only able to access the law library two-three nights a week and a few hours on the weekends,”
07 (Dkt. 1, at 12–13); and (4) since August 28, 2009, his placement in protective, administrative
08 segregation has impeded his access to legal assistance and materials, which is exemplified by
09 the law library taking “six weeks and several requests” to answer simple requests for statutes,
10 (Dkt. 1, at 13; *see* Dkt. 14, at 4).

11 DISCUSSION

12 Relevant to the present action, the one-year statute of limitations for filing a § 2255
13 motion begins to run from the latest of the following events:

14 (1) the date on which the judgment of conviction becomes final; [or]
15 (2) the date on which the impediment to making a motion created by
16 governmental action in violation of the Constitution of the Constitution or laws
of the United States is removed, if the movant was prevented from making a
motion by such governmental action

17 28 U.S.C. § 2255(f)(1)–(2). Respondent contends that petitioner’s § 2255 motion is barred by
18 the one-year statute of limitations because the date on which the judgment of conviction
19 became final was December 14, 2007; the § 2255 petition was filed on December 28, 2009; and
20 no extraordinary circumstances warrant equitable tolling. (Dkt. 8, at 2; Dkt. 10, at 2–3.)
21 Petitioner argues either that the statute of limitations should be equitably tolled because there
22 were periods in which his access to legal materials was impeded, or that the statute of

01 limitations began to run only after those impediments to access were removed at an unspecified
 02 later date. (Dkt. 1, at 12–13; Dkt. 1-2, at 3–4; Dkt. 14, at 1–5.) Petitioner also moves for
 03 clarification about the actual date that the statute of limitations began to run on his § 2255
 04 motion according to Chief Judge Lasnik’s ruling in the underlying criminal case. (Dkt. 7); CR
 05 Dkt. 107, at 2.

06 The Court clarifies that the statute of limitations for filing petitioner’s § 2255 motion
 07 began to run on the date on which the judgment of conviction became final, i.e., December 14,
 08 2007. CR Dkt. 88. None of petitioner’s allegations suggest a § 2255(f)(2) “impediment” to
 09 bringing his § 2255 motion existed on December 14, 2007: petitioner asserts that he was
 10 seeking his counsel’s assistance in filing an appeal in December 2007 and that he was actively
 11 researching his claim of ineffective assistance of counsel until his transfer to another facility in
 12 April 2008. (Dkt. 1, at 12.) Because petitioner filed his § 2255 motion over two years after
 13 his judgment of conviction became final, the motion is time-barred unless he can establish an
 14 entitlement to equitable tolling.

15 “[A] litigant seeking equitable tolling [of the one-year AEDPA limitations period] bears
 16 the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and
 17 (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S.
 18 408, 418 (2005). “The threshold necessary to trigger equitable tolling . . . is very high, lest the
 19 exceptions swallow the rule.” *Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir. 2006)
 20 (quoting *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)) (internal quotation marks and
 21 modifications omitted). Whether a petitioner is entitled to equitable tolling is a fact-specific
 22 inquiry. *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (per curiam).

01 On the present record, petitioner has shown neither diligence in pursuing his rights nor
02 that extraordinary circumstances stood in the way of filing his § 2255 motion. Nevertheless,
03 because whether a petitioner is entitled to equitable tolling is a fact-specific inquiry, the Court
04 finds that petitioner should be afforded an opportunity to present additional information. The
05 Court therefore orders as follows:

- 06 1. By **Thursday, May 27, 2010**, petitioner shall file a brief in which he specifies (a) the
07 time periods that his access to legal materials was restricted; (b) what those restrictions
08 entailed; (c) how frequently and for what duration he was able to access legal materials
09 in each of these periods; (d) how he was exercising diligence in pursuing his legal
10 rights; and (e) what evidence he would present through discovery, expansion of the
11 record, or an evidentiary hearing to show diligence and extraordinary circumstances
12 that might justify equitable tolling.
- 13 2. By **Monday, June 14, 2010**, respondent shall file a responsive brief and append any
14 declarations and documentation that might substantiate or refute petitioner's claims
15 regarding restricted access to legal materials.
- 16 3. By **Friday, June 25, 2010**, petitioner may file an optional reply brief. The Clerk shall
17 renote petitioner's § 2255 motion for consideration on the same day.

18 DATED this 20th day of April, 2010.

19 
20

21 Mary Alice Theiler
22 United States Magistrate Judge